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OPINION OF SPECIALISTS

Importance of a technical assistant expert in alleged medical and hospital malpractice lawsuits

A importância do perito assistente técnico nos processos de alegado erro médico-hospitalar

La importancia del especialista asistente técnico en los procesos de error médico-hospitalario

Ruth Cytrynbaum Cwajgenberg - Hospital Municipal Miguel Couto, Rio de Janeiro, RJ. E-mail: ruth@openlink.com.br

ABSTRACT

This article presents the main attributions of the expert technical assistant in legal proceedings, as well as the necessary qualification for such office. Also discussed are the technical and ethical aspects of the professional performance of both the Assistant Physician and the ophthalmological expert team.

Keywords: Medical Errors; Ethics, Medical; Forensic Medicine; Expert Testimony; Iatrogenic Disease.

RESUMO

Este artigo apresenta as principais atribuições do perito assistente técnico em processos judiciais, bem como a titulação necessária para tal ofício. São discutidos também os aspectos técnicos e éticos do desempenho profissional tanto do Médico Assistente como da equipe pericial oftalmológica.

Palavras-chave: Erros médicos; Ética médica; Medicina legal; Prova pericial; Doença Iatrogênica.

RESUMEN

Este artículo presenta las principales atribuciones del especialista asistente técnico en procesos judiciales, así como el título necesario para ejercer dicho oficio. Asimismo, se discuten los aspectos técnicos y éticos del desempeño profesional tanto del Médico Asistente como del equipo pericial oftalmológico.

Palabras Clave: Erros médicos; Ética médica; Medicina legal; Prova pericial; Doença Iatrogênica.

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Corresponding author: Ruth Cytrynbaum Cwajgenberg – email: ruth@openlink.com.br - Hospital Municipal Miguel Couto, Rio de Janeiro, RJ. Rua Mario Ribeiro, 117 - Leblon, Rio de Janeiro - RJ, 22430-160.

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Judicialization is a growing phenomenon, and ophthalmologists who are excellent professionals and follow ethical standards are being sued. Therefore, medical records should include as much details as possible. A well-written medical record is a physician's best defense.

A judicial expert team includes a court expert, also known as the official expert and appointed by the judge, and technical assistant experts, who are appointed by the plaintiff and defendant.

In cases in which the parties do not appoint technical assistants, the court expert alone performs the court investigation. In cases in which only one of the parties appoints a technical assistant, the judicial expert team is formed by two experts, and the presence of the defendant's technical assistant is requested.

The court expert is appointed by the judge and elaborates the technical expert report.

According to the Brazilian Code of Civil Procedure, the technical assistant expert will represent one of the parties in the court investigation and is paid by the contracting party on the contracting date.[1]

The objective of the technical assistant in the defense is to break the causal link; one way to do this is to prove that the damage was caused by iatrogenesis.

According to Carvalho (2013):

> "...PÉREZ TAMAYO classified iatrogenesis into two types: positive and negative. In positive iatrogenesis, the changes caused to the patient are harmless. In negative iatrogenesis, the patient suffers injury by the activity of a medical professional. In the medical context, negative iatrogenesis may be subdivided into necessary and unnecessary. In necessary negative iatrogenesis, the physician has full knowledge of the risk of injury, i.e., the risk is expected and predictable and the physician recognizes it as a risk inherent to his/her actions in favor of the patient. The medical decision takes into account the benefit/damage ratio, i.e., the risk of causing damage to achieve an adequate outcome for the patient. In fact, the physician previously assesses the convenience of using resources that are beneficial but cause undesired effects from medications and procedures. However, neglect, error, or lack of knowledge does not occur in any case. In fact, the potential of injury is inherent to the practice of medicine. Therefore, every activity practiced by a physician has benefits and negative outcomes."[2]

According to Couto Filho and Souza (2001), "in this perspective, the study of iatrogenesis in its strictest sense is a cause of concern for us, i.e., in the case of force majeure, which can break the causal link that may exist between the injury caused to a patient and the activity of the medical professional. This causal link may increase liability because in other contexts, the evidence of a link, although not of legal force, may give rise to the obligation to compensate."[3]

Before the creation of the Brazilian Association of Legal Medicine and Medical Investigation, the medical associations believed that all physicians were experts, but this is a contradiction because the legislation in force is not taught to medical students.

The first degree including the two specialties (Legal Medicine and Medical Investigation) was awarded in June 2012 when this new specialty was recognized by the Brazilian Medical Association [Associação Médica Brasileira (AMB)]. This medical specialty was then registered in the Regional Council of Medicine.

Being a technical assistant expert in ophthalmology requires a degree in ophthalmology and specialization in medical investigation, and the degree should be recognized by AMB.

The court expert can act as a technical assistant in other cases, provided that he/she is not hired by physicians or clinics that were previously represented by this professional in court, does not violate the code of professional ethics, and respects the ethical and normative principles of the medical profession.

The work of a technical assistant expert involves the formulation of queries, which should be answered by the court expert with the guidance of a lawyer for the presentation of the counterarguments.

The queries should be objective and brief and elaborated in a way that by the time they are answered, the court expert acknowledges all the events and their chronology.

The formulation of the queries is fundamental to the success of the action and should leave no room for evasive or irrelevant responses.

The technical assistant also attends the expert investigation to assess whether the necessary examinations have been satisfactorily performed.

After the official expert has handed the expert report, the technical assistant expert presents a technical opinion within a maximum of 15 days. In cases in which the official expert report raises doubts, the technical assistant can formulate new queries or ask for clarification of previous ones.

The deadlines are short, and the physician should contact the technical assistant immediately to ensure that there is enough time to get to know the specific case. We frequently receive case dossiers with a deadline of 48 hours to formulate queries.

After reading the case dossier and discussing with his/her colleague, i.e., the defendant in the civil or criminal action, the technical assistant contacts the lawyer and they start working together.

To ensure an adequate professional defense, it is important to hire a good lawyer who is specialized in medical issues. The technical assistant works together with the lawyer to contest the action and prepare the defense.

Complaints of medical malpractice that are presented to the Superior Court of Justice increased by 140% from 2010 to 2014. There were 260 actions in 2010 and 626 in 2014.[4]

Some prophylactic measures should be taken by physicians, such as obtaining a signed informed consent form [Termo de Consentimento Livre e Esclarecido (TCLE)]. The TCLE needs to be accurate and clear. Although there is no legal requirement for a written consent, it is the easiest way of proving that the patient gave his/her consent and was informed about the risks.

The patient should be given sufficient time to thoroughly read and understand the TCLE and consciously consent to the medical act, and this document should not be given to the patient at the time of surgery in a surgical center.

It is noteworthy that cataract surgeries have a responsibility of means and not ends, except in cases in which the surgeon promises a specific outcome (e.g., the surgery will eliminate vision impairment and the need to wear glasses).

The patient should acknowledge that the surgery is corrective, that different outcomes may occur, and that everything possible will be done to achieve the best result. The provision of this clarification could avoid many lawsuits.

According to Ambrosio and Crema (2014), "The patient should acknowledge that the best result is achieved after the bilateral implant of multifocal intraocular lenses (IOLs) and that 20% of the implants require retouching and fine adjustments, including limbal relaxing incision, Lasik, anterior and posterior shift of IOL, or secondary implant to achieve the best result. Therefore, the surgeon and the patient need to feel ready to make the above adjustments to ensure a satisfactory outcome." For example, when a physician indicates premium IOL for technical reasons, he/she should explain the potential advantages but clarify that the basic lens meets the requirements of optical correction of aphakia. The patient's acknowledgment that he/she chose a procedure that has advantages over the simple treatment of cataracts and that the treatment is covered by the insurance company decreases the risk of lawsuits."[5]

In contrast, refractive surgery, in most cases, has a liable outcome, except in cases in which the surgery is covered by a health plan and the technical assistant experts emphasize in the query that health plans cover repairing surgeries but not aesthetic surgeries.

Medical malpractice liability is the obligation of a medical professional to repair the damages caused to another individual when exercising the medical profession. Physicians should not render to the massification of healthcare, endorsed by healthcare plans and clinics owners, which expect high productivity.

When complications involving other subspecialties occur, the physician should continue treatment and bear the costs. Patients who feel protected and cared for will not sue the physician. Even in cases in which the patient is aware of a medical error, he/she will forgive the physician because a good and humane doctor–patient relationship was established.

With the advances in the technology of toric and multifocal IOLs, many patients believe that all refractive errors are corrected postoperatively because they paid for the more expensive procedure.

In many cases, the patient cannot read small letters and needs a complementary aid for that task. Although this is not a medical error, it may be an error of information and the defendant (physician) may lose the case.

Another important situation is that the medical investigation takes place in the Court of First Instance, and even when there is an appeal, the investigation conducted in this court prevails, and this investigation is essential to the final outcome.

This fact reinforces the importance of a technical assistant in the outcome of the lawsuit. Even in cases in which his/her task is completed in the court of first instance, all the queries made by this professional and his/her technical opinion will remain in the lawsuit file until the final decision, closure, and filing of the case and may be used in the conclusion, either by an appellate judge or in the Superior Court of Justice.

According to Alberto (2011), “It is not uncommon for a technical assistant to raise a thesis and/or present facts and data worthy of examination by the judge, including a complement to the technical report of the official expert. The judge may, without doubt, adopt a portion of the technical report and a portion of the technical opinion to justify his/her ruling, and it is not relevant whether this composition is to the disadvantage of the party that appointed the assistant or whether he/she will base the ruling solely on the report or the opinion…”[6]

The request for a new expert investigation after an appeal to the court of second instance is rare. However, the expert investigations that do not convince the appellate judge may be returned to the court of first instance for a new investigation and, in this case, the technical assistant should be recalled to resume the technical assistance in the professional defense. In this condition, he/she has a greater responsibility because this opportunity to reverse the situation is unique.

We have to address the loss-of-chance theory, which can also be applied to medical errors.[7]

According to Dantas, medical investigations require two imperative conditions: technical preparation and medical ethics. Therefore, the establishment of regulations and conducts is necessary in order to allow medical experts to exercise the profession within ethical parameters.[8]

Patients need good professional technicians, but they also need humane care, which is the art of medical practice and involves the establishment of a humane relationship between two individuals who bond in a period of extreme physical and psychological suffering. Providing adequate medical care demands time, which is precious, but crucial for an adequate medical practice.

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Ruth Cytrynbaum Cwajgenberg

http://orcid.org/0000-0002-8063-6011
http://lattes.cnpq.br/6332360136603062